



# 46<sup>TH</sup> ANNUAL INDIANA CONSORTIUM

*of*

## STATE AND LOCAL HUMAN RIGHTS AGENCIES CONFERENCE

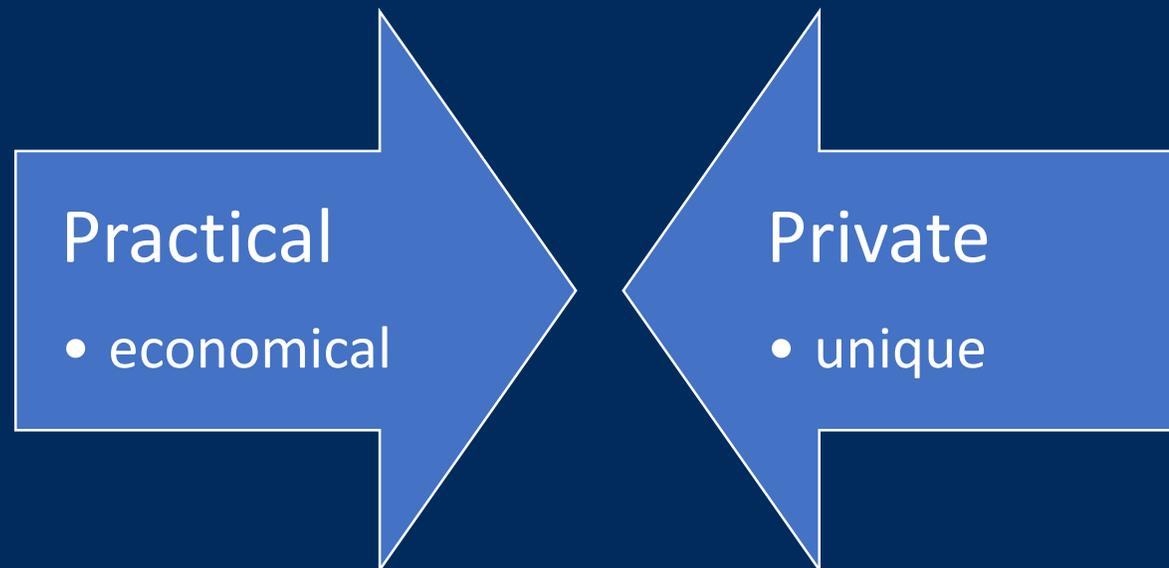
PRESENTED *by:*



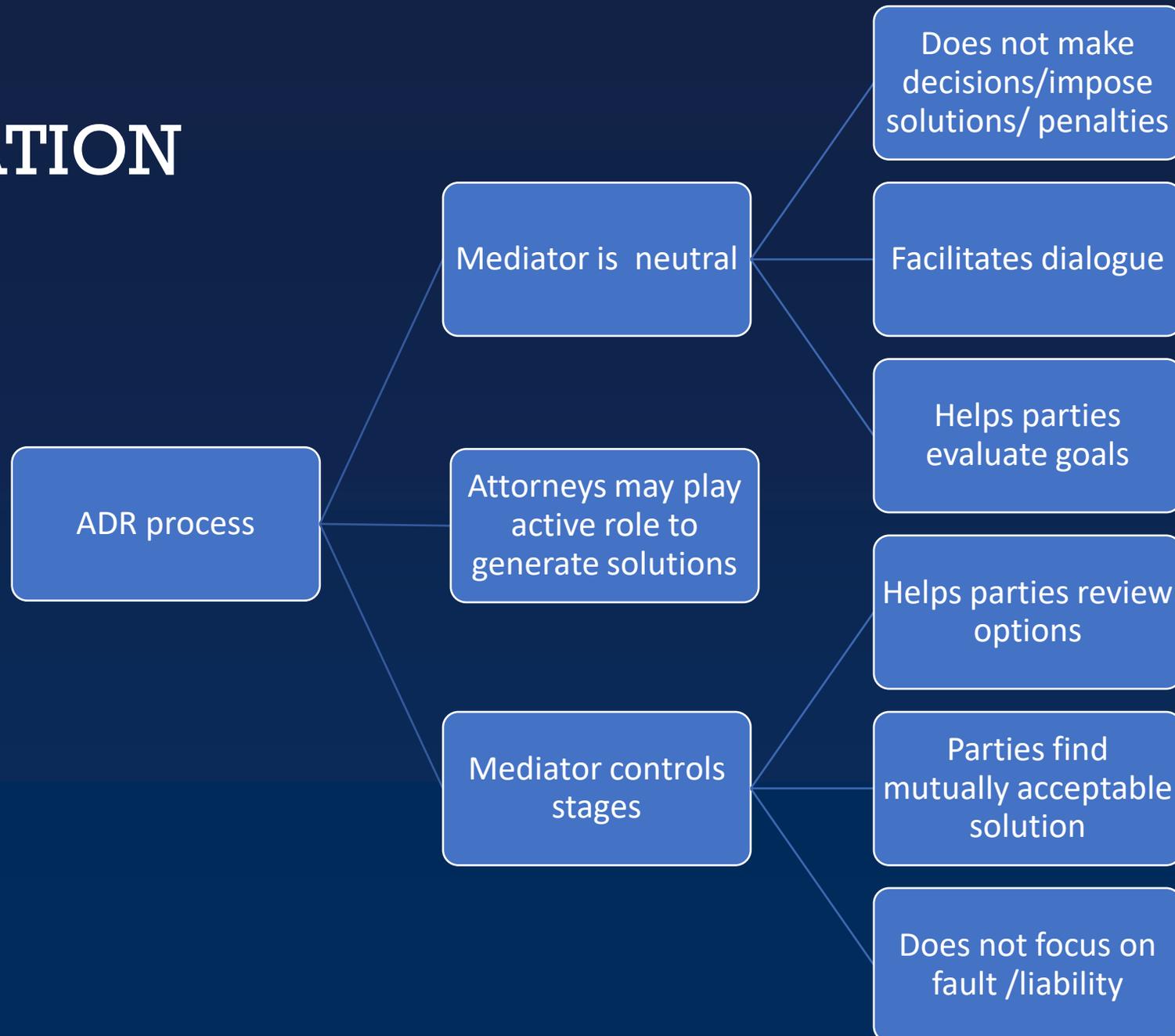
# MEDIATION & CONCILIATION

Systematic and interactive processes, which employ negotiation techniques to assist parties find the best possible solution to their problem.

Requires a facilitator who enables discussions resulting in an agreement between the parties which in turn settles the dispute



# MEDIATION



# MEDIATION



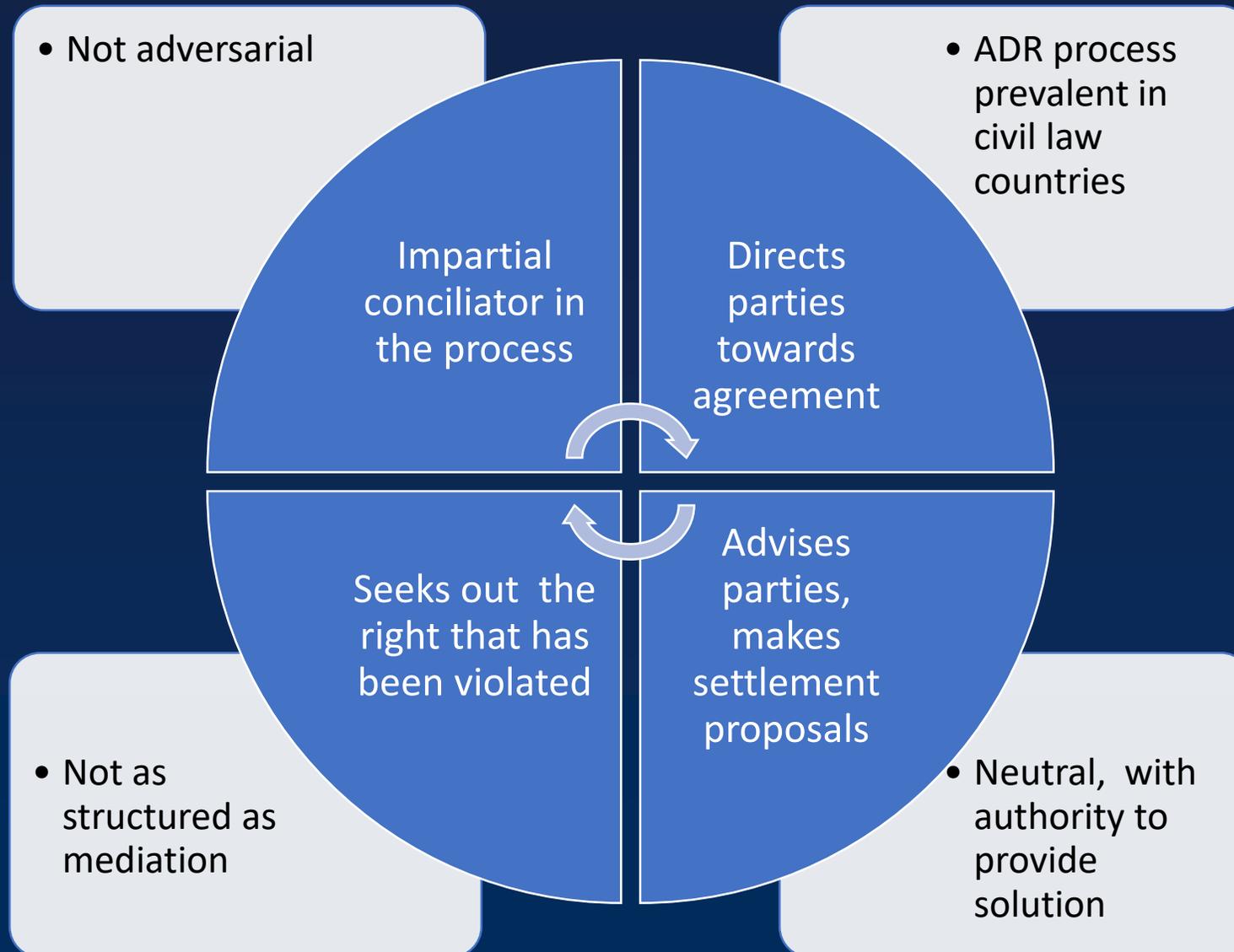
# MEDIATION



Mediator Not trying  
to uncover the truth

Mediator Not trying  
to impose legal rules

# CONCILIATION



# CONCILIATION



Conciliator  
seeks the  
violated right

Conciliator advises  
parties/responsible for  
settlement proposals

- Parties seek guidance from conciliator
- Attorneys offer advice about proposals made by conciliators

# SIMILARITIES BETWEEN MEDIATION & CONCILIATION

- Practical solutions to disputes
- Establishes balance between parties
- Complements judicial process
- Non-adversarial
- Less formal / Informal
- Timely
- Confidential\*
- Resolution may be accepted/rejected by parties



# BENEFITS



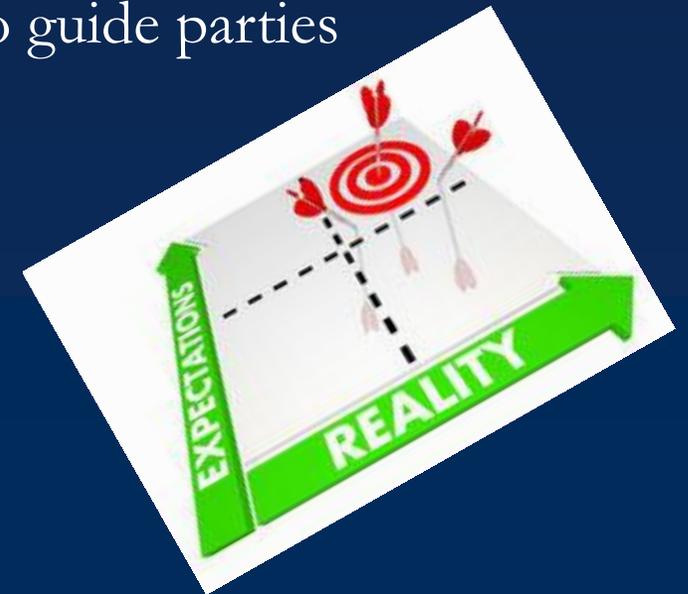
# PREPARATION IS KEY

- Block off several hours for mediation
- Choose participants strategically (witnesses )
  - Persons who have direct knowledge
  - Persons who have decision making authority
  - Persons who are genuine stakeholders
- Be aware of which party is likely to prevail if a solution is not reached
  - Research best and worst outcomes
- Inform parties that they are free to sue if they are not able to settle



# PREPARATION IS KEY

- Discuss sensitive issues/concerns in advance
  - Identify priorities
  - Do not ignore interests that are not ideal
    - May expose clues that unlock keys to a deal
  - Be familiar with what parties are willing to give and receive
  - Have case law/precedents/ realistic predictions to guide parties
  - Compile strengths & weaknesses of case
  - Direct parties towards realistic expectations
  - Prepare templates for settlement
    - Share with counsel



# DECISION MAKERS

- Ensure that parties to dispute are present
  - Witnesses are typically not necessary
  - Leave litigators at home
- Corporate decision makers **MUST** be present
  - Management/Directors who can accept offers for the entity
- Ensure that participants are aware that they will make decisions



# AGREEMENT TO MEDIATE

- Consent of parties is crucial
  - Parties must sign notice of mediation and confidentiality agreement
    - Discuss nature of mediation and implications
    - Document whether all meetings will take place with both parties present



# METHOD & PROCEDURE

In person

Hybrid

- Some parties present, some parties via phone

Teleconference

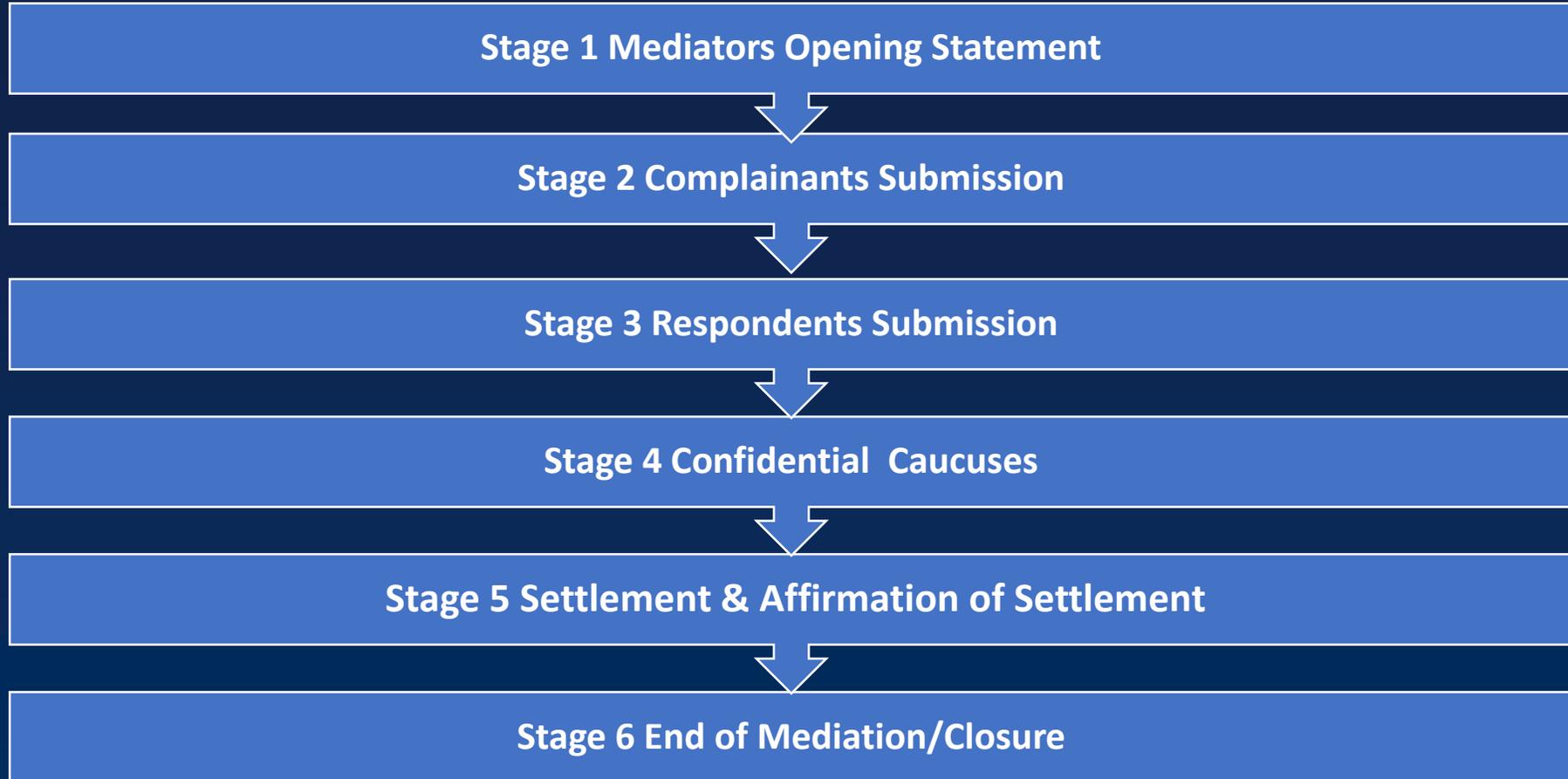


# PROCEDURE

- Structure is critical
  - Introductions
  - Opening statements
    - must be clear and thorough
- Joint sessions
  - Parties must be guided through the process
  - Ensure that salient points are covered
- Confidential caucuses
  - Encourage parties to be candid
  - Clarify whether information disclosed can be shared with other side



# STAGES



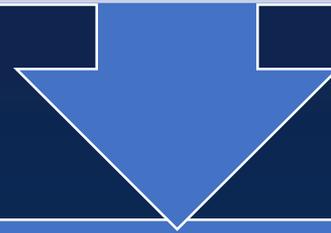
# STAGE 1

## Mediators Opening Statement

**Introductions**

**Explanation of Mediation  
Process**

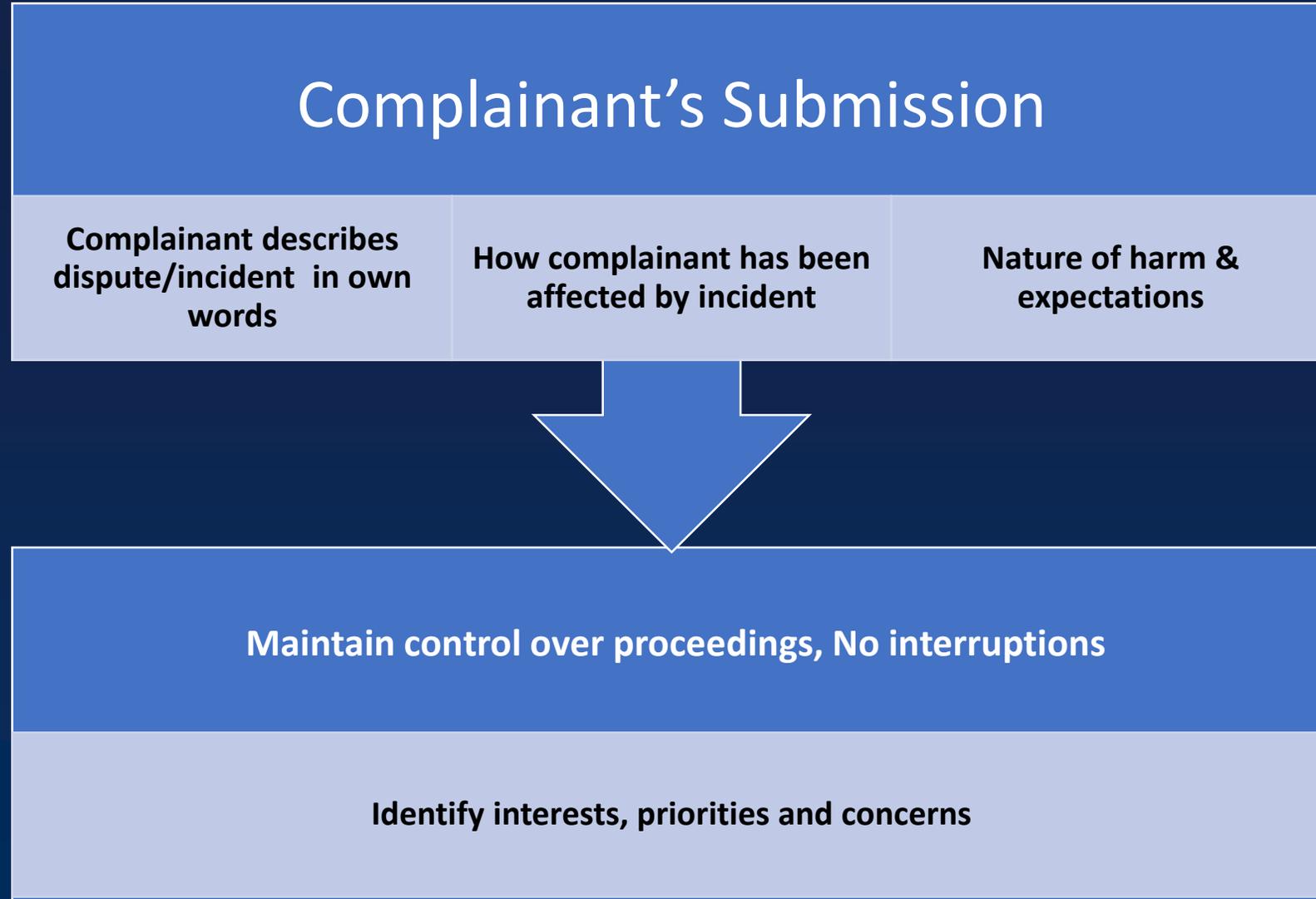
**Share Rules & Goals**



**Create a safe environment for the dialogue**

**Encourage parties to mediate in good faith**

# STAGE 2

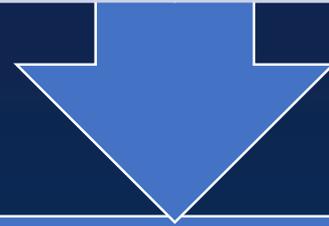


# STAGE 3

## Respondent's Submission

RP describes incident in own words

Responds to allegations and demands



Maintain control over proceedings, No interruptions

Identify interests, priorities and concerns

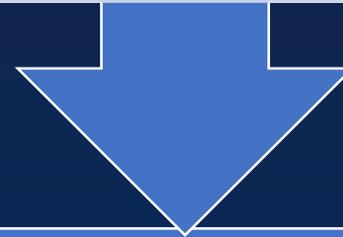
# STAGE 4

## Confidential Caucuses

Parties meet privately with mediator, discuss strengths & weaknesses

Parties distill priorities towards settlement with mediator

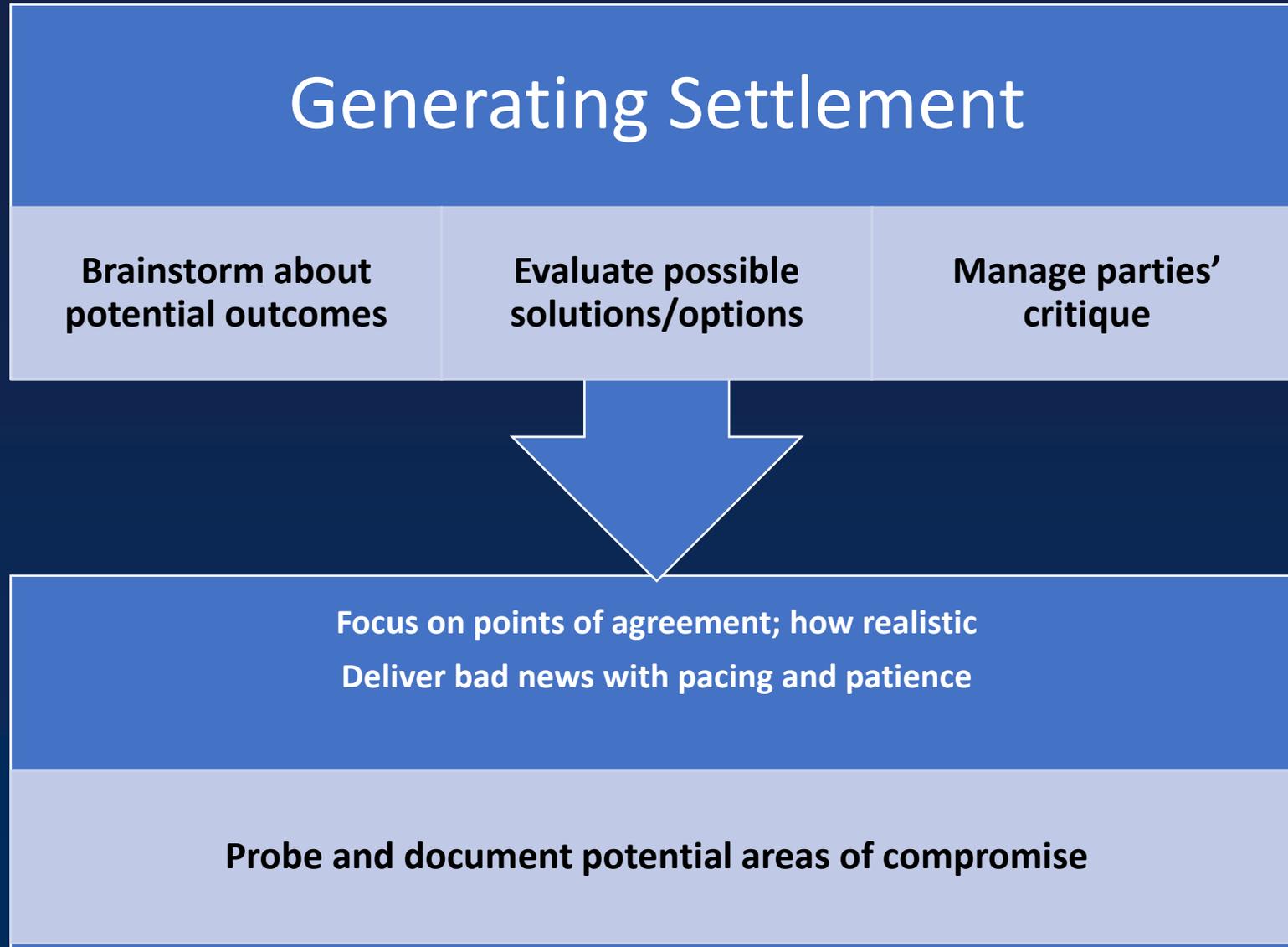
Mediator moves parties away from focusing on facts



Flexibility: explore creative ways of cooperating as against clashing

Identify main concerns: financial settlement, communications, apologies, visitation, reinstatement etc.

# STAGE 5



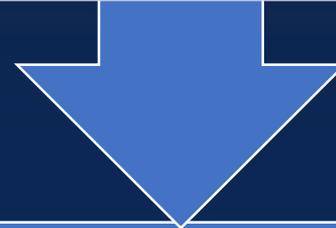
# STAGE 6

## Finalization of Settlement

**Mediator confirms final  
outcome with each  
side**

**Summarize  
agreement terms**

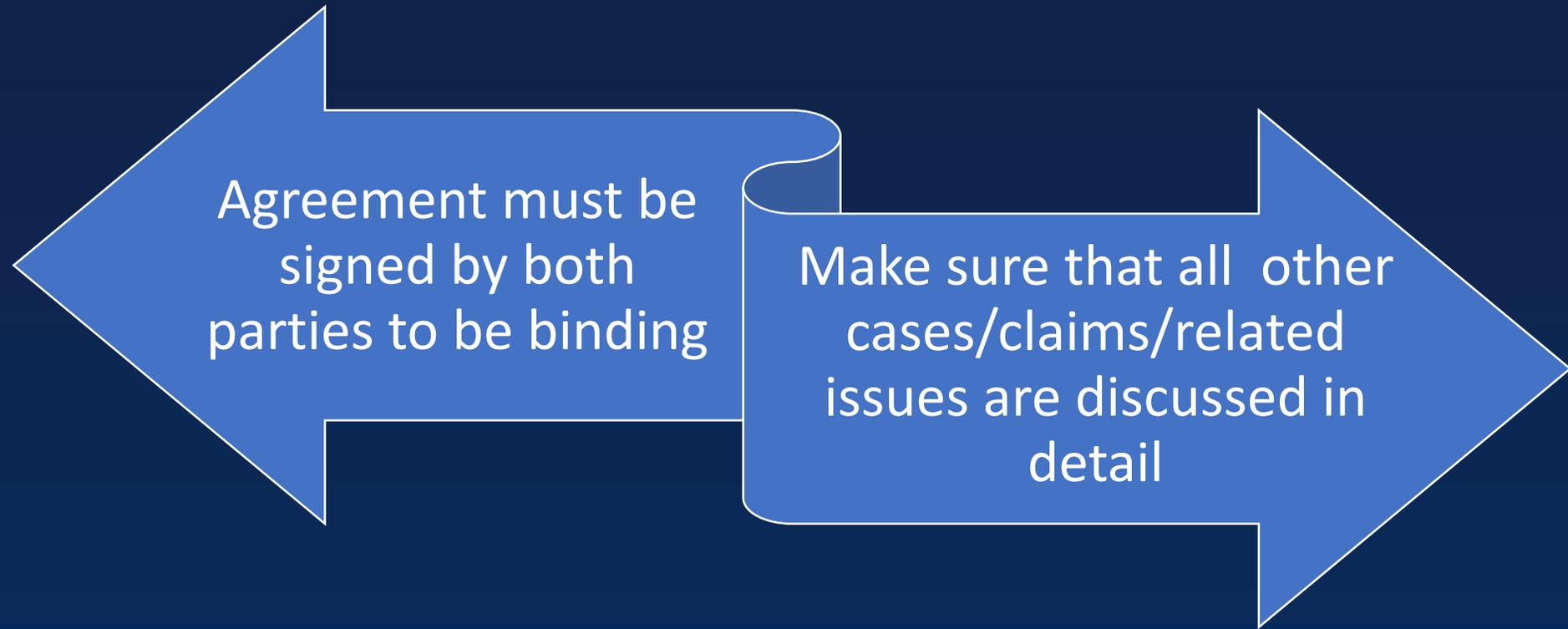
**Confirm parties'  
commitment**



**Discuss agreement format and implications for non-compliance  
Circulate for review & amend accordingly**

**Include timelines eg. Payment deadline, training dates etc.**

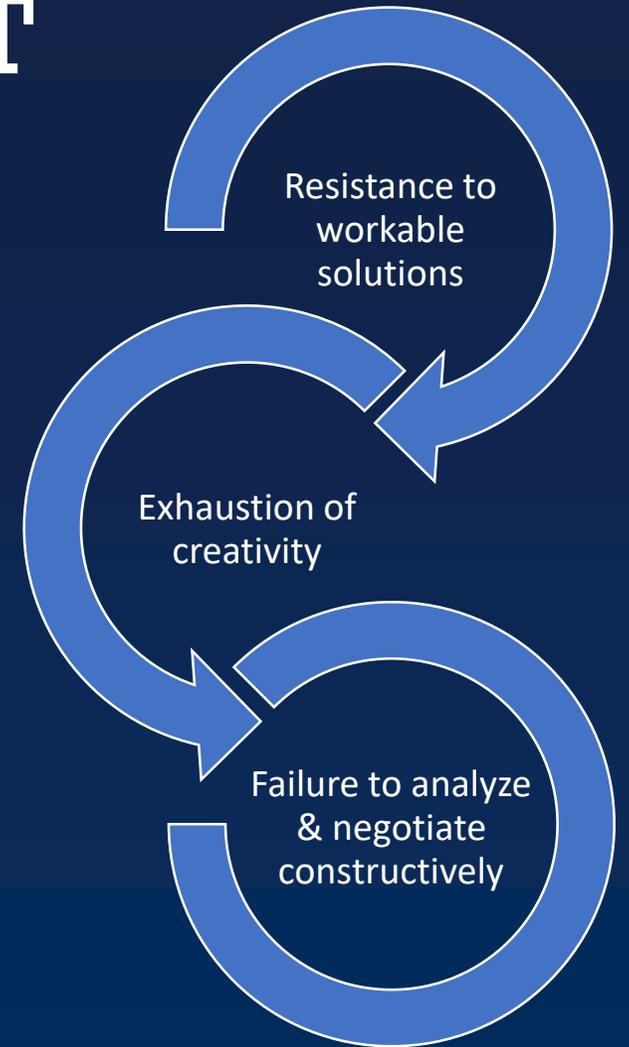
# ENDING & PAPERWORK



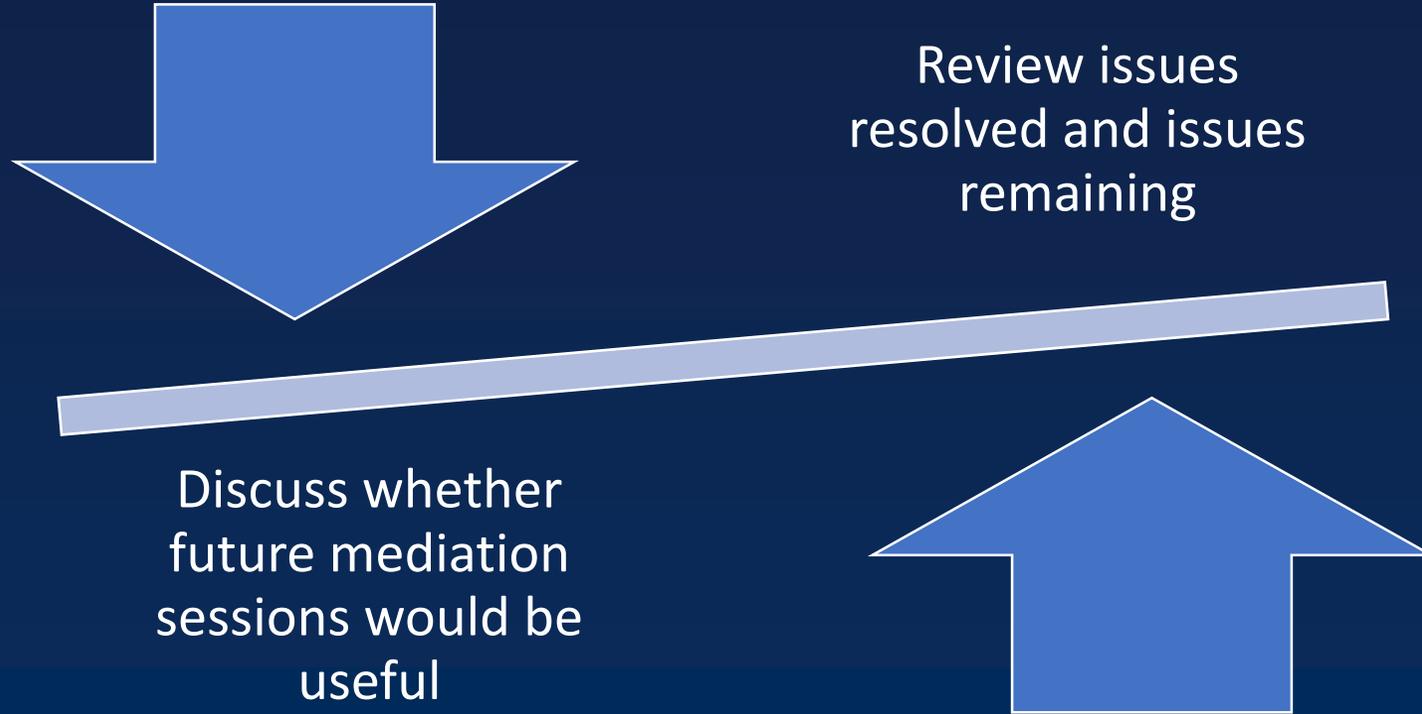
- Parties should be able to put the case behind them after settlement
- Most parties prefer one agreement covering Confirm true understanding of parties
- Attorneys may choose to draft agreement

# IMPASSE – NO AGREEMENT

- When neither party is willing to compromise any further on an issue
- Parties regard it as the end of negotiations
- Mediators need skills to ride an impasse



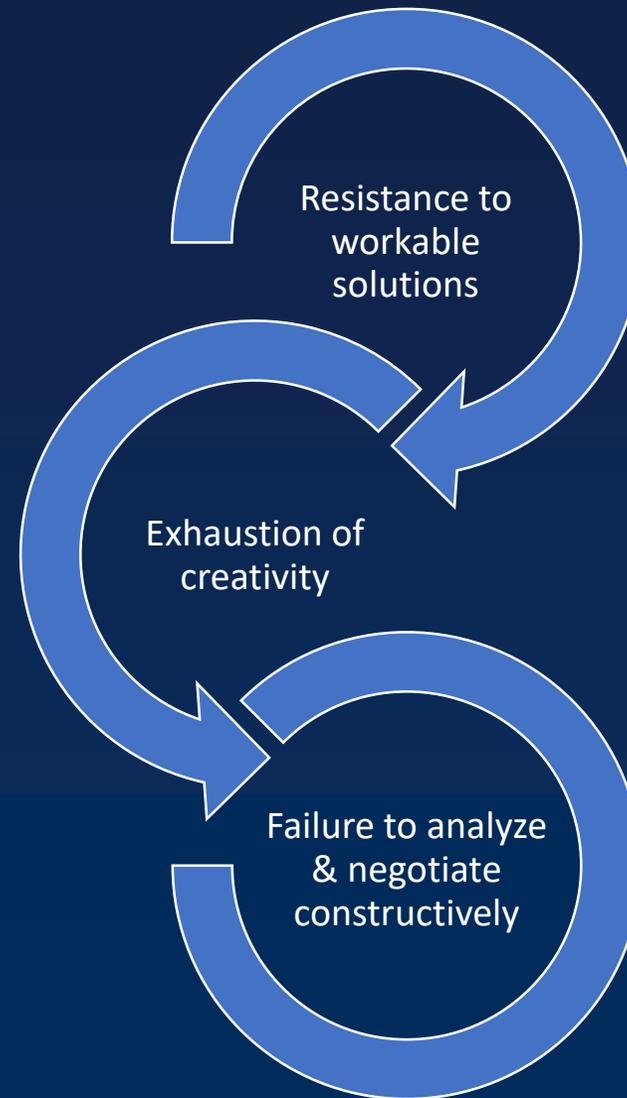
# IMPASSE - NO AGREEMENT



- Consider other dispute resolution processes
- Be clear that mediation is over and remind parties about confidentiality

# IMPASSE BREAKING TECHNIQUES

- Bracketing
- Concessions
- Splitting the difference
- Breaks
- Asking for reciprocity
- Anchoring
- Framing & Reframing
- Set thorny issue aside
- Diagnostic Questions
- Telescoping
- Break issue into smaller parts
- Suggest a trial period
- Use reality checking e.g. Court



# IMPASSE BREAKING TECHNIQUES

- Bracketing - Establishing zone of potential agreement
  - Deliberate joint movement by parties towards resolution
  - Negotiating in explicitly stated range, narrower than last offer
  - Shows willingness to reciprocate, May require counter-bracketing
  - Fast forwards negotiation- once accepted process resumes in bracket
  - Narrows the gap between parties



# IMPASSE BREAKING TECHNIQUES

- Concessions
  - Tradeoffs - Conceding/yielding/compromising during mediation
  - Recognize that negotiation is a give and take process
  - Conceding requires balancing & prioritizing interests
  - Establish value of each concession
    - Ensures that expectations are not raised unreasonably
    - Guarantees that concessions will not be taken for granted.
    - Multiple small concessions outweigh one large concession
    - Stress importance of reciprocity
    - May be withdrawn



# IMPASSE BREAKING TECHNIQUES

## Splitting the difference

- This works best when parties are within settlement range
- The party that suggests this is often the primary beneficiary
- Parties may reject offer to split difference if not in their favor





# IMPASSE BREAKING TECHNIQUES

- Breaks
  - Ease the push and pull tension
  - Preferably structured
    - Assign homework to do
      - Written alternatives
      - Financial justification
      - Reasons for position



# IMPASSE BREAKING TECHNIQUES

- Ask for Reciprocity
  - Stalling is often caused by perceived unbalanced movement
    - Encourage parties to make corresponding movements
      - Concessions/privileges should be returned in kind
      - Label concessions clearly to place value on same





# IMPASSE BREAKING TECHNIQUES

- Anchoring/Focalism

- Association of a word, phrase or gesture with a particular concept, state of being or experience

- Identify things that parties enjoy – hobbies, children etc
- Re-stimulate/anchor positive state simply by repeating the word or gesture.
- Detect when a participant is in resourceful state
  - Zoom in to move mediation forward

- Anchoring bias – giving weight to the first number put forth in a discussion
- Effective if you can predict the zone of possible agreement
- If countering against anchor, defuse it and move to counter proposal

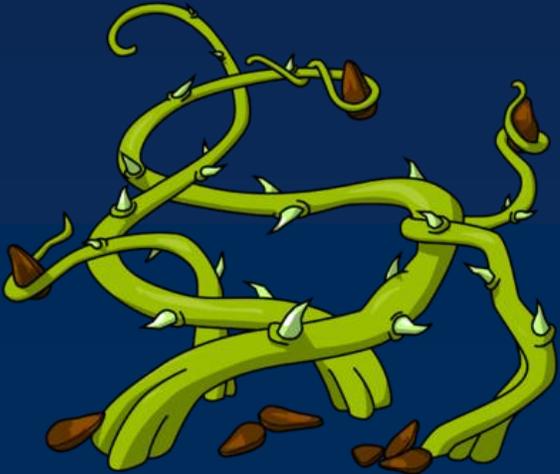


# IMPASSE BREAKING TECHNIQUES

- Reframing
  - Change the conceptual and or emotional setting/ viewpoint in relation to which a situation is experienced
  - Place the situation in another frame which suits it equally well or better and change its entire meaning
    - Shift from substantive issues to procedural or psychological concerns
    - Reframe complex argument into simple propositions that involve solutions
    - Helps people view things from different perspective
      - May generate new energy to revisit substantive issues or put the issue into proper perspective
  - Test for emotional investment by asking what it would take to surrender
  - State what each party stands to lose

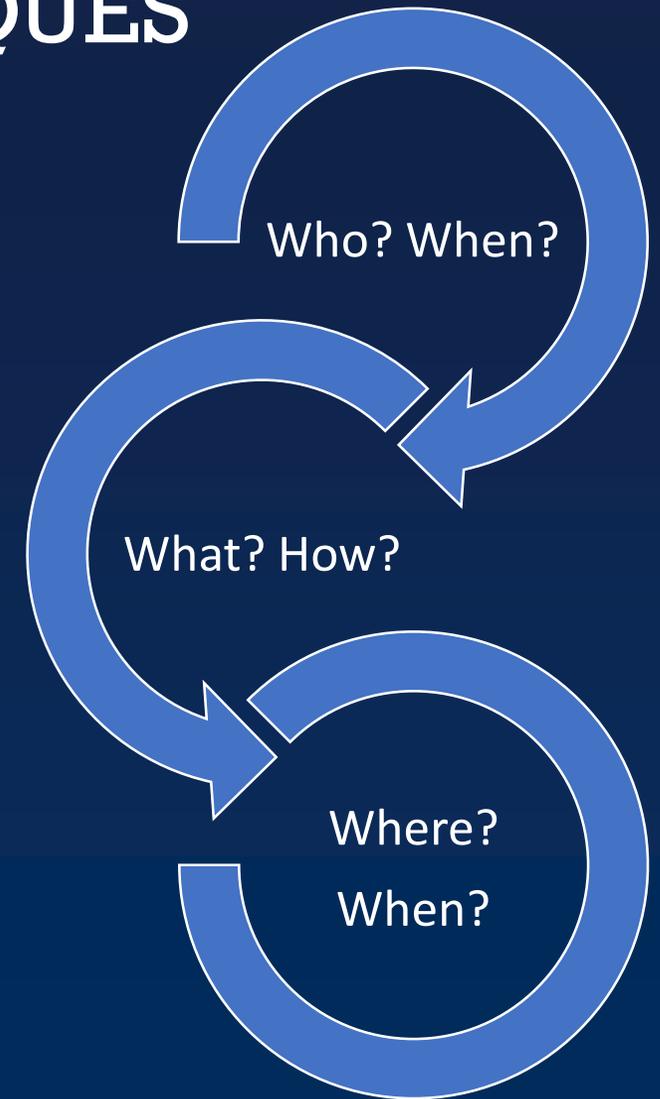
# IMPASSE BREAKING TECHNIQUES

- Setting Thorny Issues Aside
  - Change the focus of discussion
  - Move away from item on table to less complex issue
  - Return to complex issue after a positive outcome on less controversial issue
    - Parties get opportunity to re-evaluate their positions
    - Creative approach may be generated



# IMPASSE BREAKING TECHNIQUES

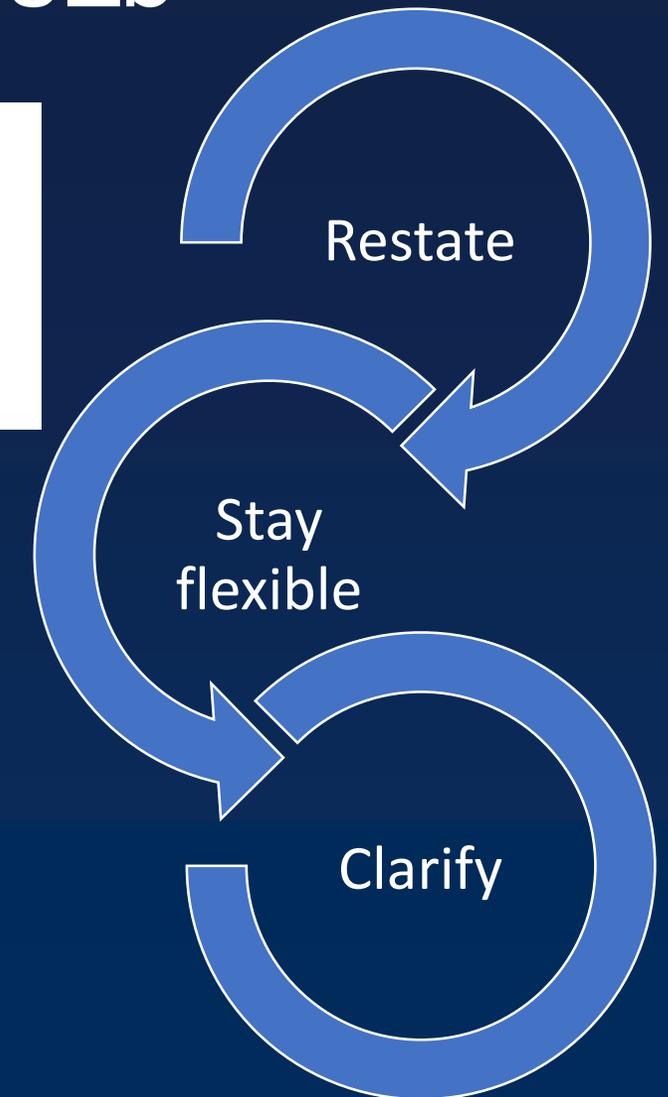
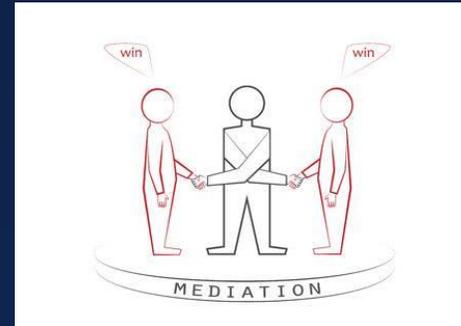
- Ask Diagnostic questions
  - Seek their interests
  - Identify underlying motives
  - what they need
  - Their fear
  - Their preferred resolutions
- Formulate solutions that serve party  
Interests and address stakeholder concerns



# IMPASSE BREAKING TECHNIQUES

- Telescoping

- Summarize both parties positions
  - Validate areas of agreement
  - Positive response to your integrity may result in positive outcome
  - Reveals points of contention
  - May reduce level of significance assigned to impasse issue. Make sure the parties realize that you are making reasonable efforts to understand their point of view



# IMPASSE BREAKING TECHNIQUES

- Break the issue down into smaller parts
  - Isolate difficult issues and reserve for later
  - Explore hidden agendas and willingness to compromise
  - Explore trade-offs



# IMPASSE BREAKING TECHNIQUES

- Suggest a trial period
- Use reality checking e.g. court outcome

# TRUST AND INTEGRITY

- Protect your integrity during process
- Build trust
- Maintain confidences
- Be honest



# COMPOSURE & CREATIVITY

- Remain calm during entire process
- Be creative and innovative, take advantage of unexpected opportunities
- Leverage information to influence offer/reception
- Manage party frustrations effectively
- Discuss all options thoroughly
- Be patient
  - Mediation involves change and change takes time
  - Address all issues carefully



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# ASSERTIVENESS & PERSUASIVENESS

- Do not be a bully or allow yourself to be bullied
- Treat all parties with respect
  - A party who feels disrespected is unlikely to give consent
- Be persuasive
  - About the merits of the case in general
  - Mutual benefits of a deal
  - Use objective logic
  - Personal credibility is an asset
  - Share offers between parties to reach a compromise

# COMMUNICATION

- Be clear and precise
- Repeat facts or options that are not well absorbed
- Focus on party interests – Getting to Yes
  - Provide solutions or paths to interests
  - Reconcile interests for the parties by providing options that are better than no deal

Empathy, active listening, seeking information are crucial elements of a successful mediation. During interactions with the parties your sole focus must be on the other person and what they have to say



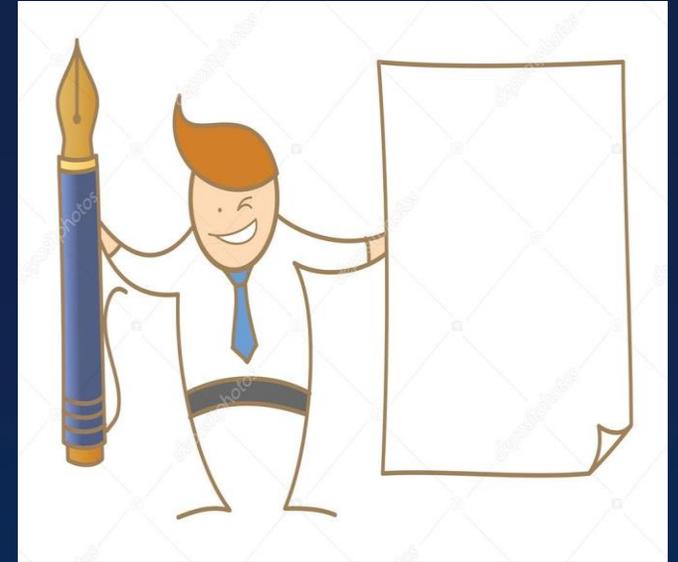
# WHAT TO EXPECT

- Competitive negotiation
  - It is not a cooperative process
  - Parties are not ready to show their cards
  - Unreasonable expectations
    - Best case at trial is a good way to manage expectations
  - Attempts to argue about who/ what is right
    - Focus on achieving a favorable settlement
    - Don't focus on vindictive arguments



# FACILITATIVE ROLE

- Gather information concerning the dispute,
- Identify the issues involved;
- Explore the respective interests of the parties
- Develop options that might satisfy the respective interests
- Evaluate the options that exist for settling the dispute
- Facilitate the conclusion of a settlement
- Facilitate the recording of the settlement in an agreement.



# FACILITATIVE ROLE

- The tone of your voice affects the success of the mediation
  - Be deliberate in your delivery
  - Use your positive voice even though the language must be direct
  - Build rapport
  - Calibrate questions carefully: open ended mostly
    - Avoid accusations or an audit like approach
    - Tap into their emotions (it feels like, it seems like)
  - Control the agenda in a non-threatening way
  - Allow /encourage the parties to suggest solutions
  - Do not be discouraged when participants say no to suggestions or offers

# RESOLUTION OPTIONS

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## Reliefs

Financial Settlement

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Reinstatement

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Employer not to contest unemployment benefits

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Reference Letter

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Training

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Reasonable accommodation

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Provide housing

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# RESOLUTION OPTIONS

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## Reliefs

Transfer (position, location, schedule, supervisor)

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Release (non-compete clause, employment radius)

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Placement support

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Change of status ( termination to resignation)

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Stock Options (buy back, accelerated vesting)

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Gift Cards

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Public statement about inclusion & anti - discrimination

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# RESOLUTION OPTIONS

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## Reliefs

HR Record revision( counselling/discipline memo removed)

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Tuition Reimbursement

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Separation Package

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Recognition (retirement party, award)

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Payment of premiums (Cobra)

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Donations to charity

---

Option to Rehire

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# THE END

Questions